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No. 02-1665

In the Supreme Court of the United States

JOHN A. GAMBONE SR. AND ANTHONY GAMBONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 26 U.S.C. 7204, which provides that the furnishing of a false or fraudulent W-2 form is punishable as a misdemeanor "[i]n lieu of any other penalty provided by law," precludes a felony prosecution for aiding the filing of false tax returns in violation of 26 U.S.C. 7206(2) based on a broad range of conduct that includes, *inter alia*, the furnishing of false W-2 forms.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 314 F.3d 163. The opinion of the district court (Pet. App. 41a-91a) is reported at 167 F. Supp. 2d 803.

JURISDICTION

The judgment of the court of appeals (Pet. App. 39a-40a) was entered on January 3, 2003. A petition for rehearing was denied on February 10, 2003. Pet. App. 92a-93a. The petition for a writ of certiorari was filed on May 12, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial, petitioners were found guilty of one count of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and 59 counts of willfully aiding and assisting in the preparation of false tax returns, in violation of 26 U.S.C. 7206(2). Pet. App. 5a-7a. Petitioners were sentenced to 37 months of imprisonment on the conspiracy count and concurrent prison terms of 36 months on the remaining counts. Petitioners were also ordered to pay fines in the amount of $75,000 and to pay restitution to the Internal Revenue Service (IRS) in the amount of $3 million. *Id.* at 7a. The court of appeals affirmed. *Id.* at 1a-38a.

1. Petitioners are brothers who owned and operated a construction business, known since 1983 as Gambone Brothers Organization, Inc. Pet. App. 3a. Over the course of 20 years, petitioners engaged in various practices that resulted in substantial amounts of taxes not being paid to the IRS. For instance, petitioners received payment in cash for their construction services and failed to report the earnings on their personal income tax returns. *Id.* at 3a-4a. In addition, to avoid the requirement of the Fair Labor Standards Act that wages for all work above 40 hours per week be paid at the rate of time and one-half, and to avoid the employer's share of Social Security and Medicare (FICA) taxes, petitioners paid their employees "straight time"—*i.e.*, regular hourly rates—for overtime work, without withholding income or FICA taxes and without reporting the overtime wages to the IRS. *Id.* at 4a.

Petitioners also paid certain employees in two additional ways that resulted in the employees' not paying taxes on their income. First, some employees would

receive a raise in the form of a fraudulent expense reimbursement, when the employee had little or no legitimate expenses. Because those payments were not included in gross wages on the employees' W-2 forms, they were not reported to the IRS and were not taxed. Second, certain employees were paid partially or completely "off-payroll"—*i.e.*, from non-payroll accounts—and no taxes were withheld as would have been the case if the wages had been paid from a payroll account. Finally, petitioners failed to issue and file IRS Forms 1099 with respect to payments made by their business for services rendered by subcontractors. Pet. App. 4a-5a; Gov't. C.A. Br. 11-12.

In an effort to conceal the overtime wages, purported expense reimbursements, and off-payroll wages paid to their employees, petitioners directed their finance department personnel to prepare and file numerous fraudulent tax documents, including false W-2 forms to be attached to employees' personal income tax returns. The W-2 forms reported regular wages but failed to report the overtime wages, purported expense reimbursements, and off-payroll wages. According to the government's estimates, petitioners aided and assisted their employees in failing to report at least $4.5 million in overtime wages and hundreds of thousands of dollars in wages disguised as expense reimbursements and off-payroll payments. Pet. App. 5a.

2. a. On April 6, 2000, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioners with conspiring to defraud the United States, in violation of 18 U.S.C. 371 (Count 1); willfully making and subscribing false individual tax returns, in violation of 26 U.S.C. 7206(1) (Counts 2 and 3); and aiding and assisting in the preparation of false individual income tax returns for 61 employees, in

violation of 26 U.S.C. 7206(2) (Counts 7-67). Pet. App. 5a-6a. On November 17, 2000, the jury found petitioners guilty on all counts except for two of the aiding and assisting counts. *Id.* at 6a.

b. After the jury verdicts, petitioners and their co-defendants renewed motions for judgments of acquittal and, in the alternative, moved for a new trial. With respect to the aiding and assisting counts, petitioners moved for an acquittal on the ground that their convictions were based solely on evidence that they had provided false W-2 forms to their employees. Citing the Sixth Circuit's decision in *Hughes* v. *United States*, 899 F.2d 1495, cert. denied, 498 U.S. 980 (1990), petitioners alleged that the punishment for providing false W-2 forms was governed exclusively by 26 U.S.C. 7204, which provides that, "[i]n lieu of any other penalty provided by law," a person who willfully furnishes a false W-2 form "shall, for each such offense * * * be fined not more than $1,000, or imprisoned not more than 1 year, or both." Petitioners contended that their convictions for aiding and assisting the preparation of false tax returns in violation Section 7206(2) thus could not be based on their furnishing of false W-2s. Pet. App. 64a-65a.

On September 4, 2001, the district court denied petitioners' motion for judgment of acquittal on the Section 7206(2) counts. Pet. App. 64a-72a.[1] The court determined that the furnishing of a false W-2 form, standing alone, is governed exclusively by Section 7204, but that conduct "which involves, but is not exclusively limited to, the provision of false W-2s" can violate Section

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[1] The district court granted petitioners a judgment of acquittal on the counts charging them with subscribing to a false tax return (Counts 2 and 3). Pet. App. 6a-7a.

7206(2). *Id.* at 68a. The court found that in this case, "the evidence, particularly that provided by the dozens of employees who testified at trial, was sufficient for any rational jury to find beyond a reasonable doubt that [petitioners] aided and assisted the employees in filing false tax returns, beyond the mere provision of false W-2s." *Id.* at 71a. "[E]ven excluding consideration of the W-2s themselves," the court concluded, "the evidence was sufficient to support the [Section 7206(2)] convictions." *Ibid.*

In particular, the court explained, the "evidence was sufficient for the jury to find that the [petitioners] created the particular payment scheme (and persisted with that scheme even after they knew it was improper) and that they communicated, either directly or through their supervisory employees, that the funds paid without withholding would not be reported. There was evidence of specific instances in which the [petitioners] indicated that payment would be made with the intention of having that payment not reported to the IRS." Pet. App. 71a. The court therefore ruled that the "evidence goes well beyond the mere provision of false W-2s." *Ibid.*

3. On appeal, petitioners renewed their challenge to their Section 7206(2) convictions for aiding and assisting the filing of false tax returns. They contended that their conduct involved only a scheme to furnish false W-2 forms and thus was governed exclusively by Section 7204. Pet. App. 9a. In addition, petitioners argued that the evidence was insufficient to sustain their convictions under Section 7206(2) because that provision requires proof of conduct beyond the furnishing of false W-2s. *Id.* at 10a.

The court of appeals affirmed. Pet. App. 1a-38a. The court concluded that "nothing in the language of either

section 7204 or section 7206(2) or in the relevant legislative history, suggests that a jury may not consider the furnishing of false W-2s in deciding whether a defendant committed an offense under section 7206(2)." *Id.* at 15a.[2] The court explained that "a person who merely furnishes false W-2s is only culpable enough to deserve a misdemeanor conviction" under Section 7204, "while a person who goes further and willfully causes a false return to be filed is more culpable and is guilty of a felony" under Section 7206(2). *Ibid.* The "relevant inquiry" under Section 7206(2), the court determined, "is whether the defendant engages in 'some affirmative participation which at least encourages' the employee to prepare or present a false return." *Id.* at 15a-16a (quoting *United States* v. *Graham*, 758 F.2d 879, 885 (3d Cir.), cert. denied, 474 U.S. 901 (1985)). "If a defendant goes beyond merely furnishing false W-2s, and if the jury finds his conduct to constitute affirmative participation that encourages employees to file false returns, it may convict him of a felony under section 7206(2)." *Id.* at 16a n.9.

The court rejected petitioners' contention that their conduct was limited to providing false W-2s. The court found that the "overwhelming weight of the evidence * * * establishes that this is not an accurate characterization of [petitioners'] conduct." Pet. App. 19a. According to the court, "there plainly was sufficient circumstantial evidence to support a finding that

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[2] Section 7206(2) provides that any person who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under * * * the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter * * * shall be guilty of a felony." 26 U.S.C. 7206(2).

[petitioners] engaged in a long-running scheme to encourage their employees to file false returns." *Ibid.*[3]

ARGUMENT

1. Petitioners contend (Pet. 12-13) that the court of appeals' decision conflicts with the Sixth Circuit's opinion in *Hughes* v. *United States*, 899 F.2d 1495, cert. denied, 498 U.S. 980 (1990). That is incorrect.

The court of appeals in this case held that the furnishing of a false W-2 form, without more, is governed exclusively by Section 7204, but that the furnishing of a false W-2 form in combination with other conduct encouraging an employee to file a false tax return can amount to assisting in the preparation of a false return in violation of Section 7206(2). Contrary to petitioners' contention (Pet. 13), the Sixth Circuit did not conclude in *Hughes* that "a section 7206(2) conviction [must] be based upon independent, stand alone evidence—evidence sufficient by itself without consideration of the false W-2 misconduct." Instead, the Sixth Circuit determined that, on the facts of the particular case, the defendant had taken no action other than providing a false W-2 form. *Hughes*, 899 F.2d at 1501. In that situation, the court reasoned, Section 7204 rather than Section 7206(2) was the controlling provision. *Id.* at 1500-1501. That conclusion is fully consistent with the court of appeals' opinion in this case.

Here, unlike in *Hughes*, there was ample evidence of conduct other than the furnishing of false W-2s that was intended to encourage the employees to file false

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[3] Petitioners were sentenced to a term of 37 months of imprisonment on their conspiracy conviction and a concurrent term of 36 months of imprisonment on their Section 7206(2) convictions. In this Court, they do not challenge their convictions on the conspiracy count.

returns. As the court of appeals explained, petitioners "not only furnished false W-2s to scores of employees, but also created false employee time cards, engaged in intricate and deceptive bookkeeping intended to mask underreported income, and issued checks to employees from nonpayroll accounts for unreported overtime wages." Pet. App. 19a; see *id.* at 71a. The court of appeals concluded that "[c]umulatively, this evidence supports an inference that [petitioners], either themselves or through their agents, encouraged employees not to report overtime income." *Id.* at 20a-21a. Moreover, the district court found that, "even excluding consideration of the W-2s themselves, the evidence was sufficient to support the convictions" under Section 7206(2). *Id.* at 71a.

Petitioners also urge review (Pet. 13) on the basis that the Second and Seventh Circuits upheld Section 7206(2) convictions involving the provision of false W-2s in *United States* v. *MacKenzie*, 777 F.2d 811, 820 (2d Cir. 1985), cert. denied, 476 U.S. 1169 (1986), and *United States* v. *Isaksson*, 744 F.2d 574, 577-578 (7th Cir. 1984). Neither of those decisions, however, addresses the relationship between Sections 7204 and 7206(2).

2. Petitioners contend (Pet. 13) that the construction of Section 7204 adopted by the court of appeals nullifies the language in that provision stating that the prescribed penalties for furnishing a false W-2 are "[i]n lieu of any other penalty provided by law." That is incorrect.

The court of appeals ruled that, "although the 'in lieu of' language suggests that proof of the mere furnishing of false W-2s is insufficient as a matter of law to support a section 7206(2) conviction, such evidence plus any other evidence suggesting a defendant's intent to cause

a false return to be filed form a proper evidentiary basis for such a conviction." Pet. App. 15a. That approach does not nullify the "in lieu of" language in Section 7204. As the court explained (*id.* at 16a n.9), "persons who furnish false W-2s may avoid felony convictions so long as they either eschew * * * ancillary conduct" that goes beyond providing a false W-2, "or at least engage in such conduct in such a way that a jury does not believe to constitute affirmative participation that willfully encourages employees to file false returns."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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